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Supreme Court, U.S.
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No. 98-1279

In The

Supreme Court of the United States

October Term, 1998

LUCKY STORES, INC. AND SUBSIDIARIES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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DISCLOSURE PURSUANT TO RULE 29.6

The Petitioner Lucky Stores, Inc. states that the disclosure required by Rule 29.6 of the Rules of the Supreme Court of the United States has been included in its Petition for Writ of Certiorari filed on February 10, 1999.

REPLY TO BRIEF IN OPPOSITION

This Reply Brief addresses Respondent's argument that Petitioner is relying on TAMs rather than a Revenue Ruling, and Respondent's reliance on *Dixon v. United States*, 381 U.S. 68 (1965).

ARGUMENT

Respondent's Brief in Opposition frames the wrong question. It attempts to portray this case as involving reliance upon TAMs, not a Revenue Ruling.

If Petitioner could rely on TAMs as precedent, they would be dispositive. They make clear that contributions to defined benefit pension plans are all "treated in the same manner" for purposes of applying Revenue Ruling 76-28. It is uncontroverted that at least three TAMs adopted this interpretation of Revenue Ruling 76-28. Pet. App. 127-130.[1] So did the IRS Audit Manual. ER 184, 249-250. The many PLRs are consistent. Pet. Reply Br. 2-4. For nearly twenty years the IRS administrative position

[1] Abbreviations used herein for citations include the following:

- Pet. – Petitioner's Petition for Writ of Certiorari;
- Pet. App. – Petitioner's Appendix to the Petition for Writ of Certiorari;
- Resp. Opp. – Brief for the Respondent in Opposition;
- ER – Excerpts of Record filed with the Ninth Circuit; and
- Pet. Reply Br. – Petitioner's Reply Brief filed with the Ninth Circuit.

adopted this interpretation of Revenue Ruling 76-28, which was changed by the IRS only for this litigation.

But Petitioner necessarily disclaims reliance upon the TAMs as precedent, the Code providing that TAMs may not be "used or cited as precedent." 26 U.S.C. § 6110(j)(3) (1986) (current version at 26 U.S.C. § 6110(k)(3) (1998)).

Contrary to the allegation in Respondent's Brief in Opposition, Petitioner relies on the text of Revenue Ruling 76-28, and the reasonableness of its own interpretation of the Revenue Ruling. The interpretation relied upon by Petitioner is no far-fetched, contrived interpretation. It was determined to be the correct interpretation by the only U.S. District Court to address the question. *Airborne Freight Corp. v. United States*, No. C95-301R, 1995 U.S. Dist. LEXIS 19822 (W.D. Wash. Nov. 7, 1995), *rev'd* 153 F.3d 967 (9th Cir. 1998). And, of course, Petitioner's interpretation was the IRS's own interpretation for the first twenty years of the Revenue Ruling, evidencing the reasonableness of Petitioner's interpretation. Pet. Reply 2-4.

It is beside the point addressed in this Petition whether the IRS was correct before or correct now, or whether the U.S. District Court's interpretation is correct rather than the Tax Court's interpretation, affirmed by the Ninth Circuit in this case and the Tenth Circuit in the companion case *American Stores Company v. Comm'r*, No. 97-9025, 1999 U.S. App. LEXIS 3640 (10th Cir. Mar. 9, 1999) (issued after Petitioner's Petition for Writ of Certiorari was filed). The issue put to this Court at this time is not which interpretation is the correct one. The issue

instead is the right of taxpayers to rely upon their interpretation of a Revenue Ruling, when that interpretation is bona fide and reasonable, and the Ruling itself is ambiguous. The importance of the question is clear: If only a "correct" interpretation can be relied upon, any notion of reliance is illusory and from the standpoint of reliance, Revenue Rulings are a nullity. Such a result cannot be squared with the affirmative right to rely expressly provided, since 1973, by Regulation. Treas. Reg. § 601.601(d). In this case, Appellant relied upon a 1976 Revenue Ruling for reporting its 1986 tax year, applying the Revenue Ruling as it was interpreted by the IRS in 1986.

The decision of the Fifth Circuit in *Estate of McLendon* confirms, if not establishes, the right to rely on a Revenue Ruling. *Estate of McLendon v. Comm'r*, 135 F.3d 1017 (5th Cir. 1998). The opinion of that court does not discuss whether the taxpayer's interpretation of the Revenue Ruling is more correct than the IRS's proposed new interpretation in which the IRS sought to reinterpret the Ruling to render it inapplicable. It was enough for the court that "[b]ecause McLendon was entitled to rely on Rev. Rul. 80-80, the Tax Court was not at liberty to disregard it." *Id.* at 1025.

The Brief in Opposition and the decision of the Tenth Circuit in *American Stores Company*, well illustrate the need to hear this case. Both rely heavily on this Court's decision in *Dixon* to characterize the right of taxpayers to rely on Revenue Rulings.[2] 381 U.S. 68; Resp. Opp. 15. Yet

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[2] The decision in *Dickman v. Comm'r*, 465 U.S. 330 (1984) is also relied upon, as it follows *Dixon*. *Dickman* did not involve

neither mentions that *Dixon* was decided in a pre-reliance era and is obsolete. During the year at issue in *Dixon*, the IRS did not invite reliance, and instead disclaimed any right to rely. The tax year was 1952. *Id.* at 70. The prefatory language of the cumulative bulletin in 1952 provided that Rulings "have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury." 1952-1 C.B. i. The Ruling that the taxpayer in *Dixon* relied on was issued in 1944. 381 U.S. at 71 n.2. The prefatory language of the cumulative bulletin in 1944 was identical. 1944 C.B. i.

In the modern era, the issue of reliance is radically different. Reliance on Revenue Rulings is *invited* by the IRS. Since 1973, a Regulation has been explicit; it provides an affirmative right of reliance. Treas. Reg. § 601.601(d)(2)(v)(*d*). This Court has not addressed the issue of reliance on Revenue Rulings under that Regulation, or otherwise, in the modern era. Yet the government persists in citing *Dixon*, and the appellate courts follow.

It is the vacuum of decisions by this Court that permits the IRS to dishonor its own Revenue Rulings in the guise of "reinterpretation", and which has led astray the appellate courts and others who continue to rely on *Dixon*. This Court should clarify taxpayers' right to rely, which presents a fundamental question of administration

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reliance on Revenue Rulings, but rather the different question of whether the IRS may change an informal practice not embodied in any formal pronouncement. 465 U.S. at 342-343.

of the tax laws. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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